COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department of Telecommunications and Energy on its own Motion into the Appropriate Regulatory Plan to succeed Price Cap Regulation for Verizon New England, Inc. d/b/a Verizon Massachusetts' intrastate retail telecommunications services in the Commonwealth of Massachusetts	D.T.E. 01-31-Phase I

December 12, 2001

HEARING OFFICER RULING ON MOTION BY THE ATTORNEY GENERAL TO COMPEL, OR IN THE ALTERNATIVE, TO STRIKE PORTIONS OF VERIZON'S TESTIMONY

I. INTRODUCTION

On December 6, 2001, the Attorney General for the Commonwealth of Massachusetts ("Attorney General" or "AG") filed with the Department of Telecommunications and Energy ("Department") a Motion to Compel, or, in the Alternative, Motion to Strike Portions of Verizon's Testimony ("AG Motion to Compel"). On December 11, 2001, Verizon Massachusetts ("Verizon" or "VZ") filed an opposition to the AG Motion to Compel ("VZ Opposition"). Also on December 11, 2001, AT&T Communications of New England, Inc. ("AT&T") filed comments in support of the AG Motion to Compel ("AT&T Comments").

II. STANDARD OF REVIEW

With respect to discovery (i.e., information requests), the Department's regulations provide:

> The purpose for discovery is to facilitate the hearing process by permitting the parties and the Department to gain access to all relevant information in an efficient and timely manner. Discovery is intended to reduce hearing time, narrow the scope of the issues, protect the rights of the parties, and ensure that a complete and accurate record is compiled.

220 C.M.R. § 1.06(6)(c)(1). Hearing Officers have discretion in establishing discovery procedures and are guided, but not bound, in this regard by the principles and procedures underlying the Massachusetts Rules of Civil Procedure, Rule 26, et seq. 220 C.M.R. § 1.06(6)(c)(2). Mass. R. Civ. P. 26(b)(1) provides that:

> Parties may obtain discovery regarding any matter, not privileged, relevant to the subject matter involved in the pending action. . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Finally, G.L. c. 30A, § 12(1) provides agencies with the power to require the testimony of witnesses and the production of evidence. G.L. c. 30A, § 12(3) states, in part, that any party to an adjudicatory proceeding shall be entitled as of right to the issue of subpoenas in the name of the agency conducting the proceeding. The Department's rule, 220 C.M.R. § 1.10(9), embodies the statutory authority to compel the appearance of witnesses and production of documents by subpoena.

III. POSITIONS OF THE PARTIES

A. Attorney General

In his Motion to Compel, the Attorney General argues that Verizon should be compelled to produce copies of the approximately 30 pages of the "CLEC Report 2001" identified in Verizon's supplemental reply to information request AG-VZ-4-11 (AG Motion to Compel at 1). The Attorney General asserts that Verizon used the information in the CLEC Report 2001 to draw conclusions in its direct testimony regarding the state of local competition in Massachusetts, and, therefore, Verizon must produce the information to the parties (id. at 1-2). The Attorney General states that although Verizon asserts that it is barred under copyright law from making copies of the relevant pages, Verizon has allowed the Attorney General access at Verizon's offices to the CLEC Report 2001 (id. at 2). The Attorney General asserts that the pages must be used for cross-examination at the evidentiary hearings and argues that his cross-examination will be difficult to follow and suffer from a procedural record defect if Verizon is not compelled to file with the Department the relevant pages of the CLEC Report 2001 (id. at 4).

The Attorney General argues that if Verizon is not compelled to file the pages of the CLEC Report 2001 referred to in its response to AG-VZ-4-11, then the portions of Verizon's testimony that rely on the report should be stricken from the record (id. at 1). The Attorney General asserts that Department precedent requires that unsupported testimony be stricken and not considered in the final decision if it is not withdrawn by the offering party (id. at 2-3).

B. Verizon

Verizon argues that the AG Motion to Compel should be denied (VZ Opposition at 1). Verizon asserts that Verizon did not make and produce copies of the relevant pages of the CLEC Report 2001 requested by the Attorney General because of Verizon's concerns with copyright protection (id. at 1 n.2). Verizon argues that it did provide the Attorney General

access to the requested material at Verizon's offices, and allowed the Attorney General to make copies as he saw fit (id. at 1). Verizon argues that the Attorney General already has in his possession the documents which he now seeks to compel and therefore the Attorney General has suffered no harm (id. at 2). In addition, Verizon argues that the AG Motion to Compel is significantly untimely and that the Attorney General has provided no supportable explanation for his failure to comply with the Department's procedural rules regarding timely filing of such motions (id.).

C. AT&T

In its comments, AT&T supports the AG Motion to Compel (AT&T Comments at 1). AT&T argues that Verizon has inappropriately asserted a copyright objection to full production of data it relies upon in support of its position (id. at 2). AT&T argues that Verizon's objection to production is inconsistent with longstanding Department practice and is not in conformance with the "fair use" provisions of copyright law (id. at 2-3). AT&T argues that sustaining Verizon's refusal to produce materials on copyright grounds would undermine the Department's ability to conduct proceedings that frequently rely on the use of copyrighted material in the record (id. at 3). It is Verizon's responsibility, argues AT&T, to make appropriate arrangements with third-parties, if Verizon seeks to rely upon information of third-parties in this investigation (id. at 4). AT&T argues that if Verizon is not compelled to produce the requested information, portions of the testimony of Verizon's witness that rely upon the requested information must be stricken as unsupported conclusory assertions (id.).

IV. ANALYSIS AND FINDINGS

According to the Department's procedural rules, when addressing a late-filed Motion to Compel, such as the instant motion filed by the Attorney General, a hearing officer must first determine that the moving party has shown good cause for the late filing.[1] Here, the Attorney General filed his motion after a significant delay.[2] In his Motion to Compel, the Attorney General suggests three reasons as good cause for his late filing: 1) repeated requests by the Attorney General for compliance; 2) the pending commencement of evidentiary hearings; and 3) Department precedent that supports late filing of such motions (AG Motion to Compel at 2

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[1] Pursuant to 220 C.M.R. § 1.06(c)(4), "Unless otherwise permitted by the presiding officer for good cause shown, [a motion to compel] shall be made no later than seven days after the passing of the deadline for responding to the request."

[2] Verizon's response to AG-VZ-4-11 was due on October 15, 2001. Verizon originally responded on October 12, 2001, and supplemented its response on October 16, 2001. Even if we start the "clock" on October 16, a motion to compel should have been filed by October 23, 2001. The Attorney General's Motion to Compel Verizon's response to AG-VZ-4-11 was filed with the Department on December 6, 2001.

n.6). While I am not persuaded by the second and third reasons offered by the Attorney General, I determine that the Attorney General's first proffered reason – repeated requests for compliance – provides good cause for late filing in this instance. In D.T.E. 01-31-Phase I at 8, Hearing Officer Ruling on Motion by AT&T Communications of New England, Inc. To Compel Discovery Responses by Verizon Massachusetts, or, in the Alternative, to Strike Testimony of Robert Mudge and William E. Taylor, and Motion by Verizon Massachusetts for Confidential Treatment (September 14, 2001), the parties were reminded of their obligations to attempt to resolve discovery disputes before bringing them to the Department. I determine that although the Attorney General's delay in filing his Motion to Compel is significant, the Attorney General was complying with the Department's directive by attempting repeatedly to resolve the dispute during the delay, and, therefore, has shown good cause for late-filing his Motion to Compel. However, parties are advised that the same degree of latitude may not be extended if it is clear that repeated attempts at resolution will not bear fruit and a prolonged delay in filing is not supportable.

Turning to the merits of the AG Motion to Compel, I determine that Verizon should be required to produce the portions of the CLEC Report 2001 upon which it relies in its response to AG-VZ-4-11. The Department's standard of review for discovery, referencing the Massachusetts Rules of Civil Procedure, states that parties to a Department proceeding "may obtain discovery regarding any matter, not privileged,[3] relevant to the subject matter" of the proceeding. In this case, the relevance of the pages of the CLEC Report 2001 referred to by Verizon in its response to AG-VZ-4-11 has not been disputed.

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[3] Neither party argues that the information sought by the Attorney General is privileged under Department regulations or precedent. G.L. c. 30A, § 11 makes evidentiary privilege the only statutorily mandated evidentiary rule of exclusion. See Western Massachusetts Electric Co., D.P.U. 92-8C-A at 22-30, Order on Appeal by Western Massachusetts Electric Co. of Hearing Officer Ruling Granting Attorney General's Motion to Compel Discovery (June 25, 1993); Boston Gas Co., D.P.U. 88-67 (Phase I) at 15-22 (September 30, 1988).

A similar situation recently arose in the Department's D.T.E. 01-20 proceeding,[4] in which AT&T argued that it could not produce a response to a Verizon information request because it consisted of intellectual property of third parties not subject to the Department's regulatory jurisdiction. D.T.E. 01-20 Interlocutory Order at 10. Responding to an AT&T motion for relief from the obligation to provide the information request response, the Department concluded that a third-party licensing agreement could not defeat Verizon's legitimate interest in reviewing the data that were the subject of the information request. Id. at 11. Pursuant to the D.T.E. 01-20 Interlocutory Order, AT&T was required to produce the information subject to the intellectual property claims of third-parties to the maximum extent possible. See id. at 12. In that Order, the Department made clear that parties cannot use intellectual property claims of others to avoid discovery production obligations:

> [G]oing forward, if a party chooses to enter into agreements with third parties that will preclude the discovery or cross-examination about that party's own evidence, then the party resisting discovery or cross-examination about its own evidence presented in the case is on notice that such evidence (or potential evidence, where it has not yet been presented on the record, but merely filed) (a) may be subject to limitations by the Department on the weight to be given that evidence or (b) may be excluded altogether.

Id. at 35-36. Therefore, to the extent that Verizon is able to provide further access to the requested material, including physical copying and filing of the relevant pages of the CLEC Report 2001 (with its use appropriately limited by protective agreement, as suggested by AT&T), Verizon is hereby directed to do so, or Verizon must face the outcome anticipated above. As I grant the AG Motion to Compel, I do not reach the Attorney General's alternative motion to strike portions of Verizon's testimony.

V. RULING

The Attorney General's Motion to Compel is granted.

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[4] Investigation by the Department of Telecommunications and Energy on its own Motion into the Appropriate Pricing, based upon Total Element Long-Run Incremental Costs, for Unbundled Network Elements and Combinations of Unbundled Network Elements, and the Appropriate Avoided Cost Discount for Verizon New England, Inc. d/b/a Verizon Massachusetts' Resale Services in the Commonwealth of Massachusetts, D.T.E. 01-20, Interlocutory Order on AT&T's Motion for Relief, Motions to Compel Verizon Responses to AT&T Information Requests, and Conditional Motion to Strike Verizon's Recurring Cost Model (October 18, 2001) ("D.T.E. 01-20 Interlocutory Order").

Under the provisions of 220 C.M.R. § 1.06(6)(d)(3), any party may appeal this Ruling to the Commission by filing a written appeal with supporting documentation within five (5) days of this Ruling. Any appeal must include a copy of this Ruling.

Date: December 12, 2001 _____/s/_____
Paula Foley, Hearing Officer